Supreme Court, U.S.
FILED
OCT 29 1991
OFFICE OF THE CLERK

No. 91-543

In The

Supreme Court Of The United States

October Term, 1991

THE STATE OF NEW YORK,
Petitioner,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,
Respondents,

The State of Washington; The State of Nevada; and The State of South Carolina,
Intervenor-Respondents

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER STATE OF NEW YORK

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE CONNECTICUT
55 Elm Street
Hartford, CT 06106
(203) 566-2026

AARON S. BAYER
Deputy Attorney General
WILLIAM B. GUNDLING*
Associate Attorney General
CHARLES WALSH
Assistant Attorney General
Counsel of Record for Amicus Curiae

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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INTEREST OF THE AMICUS CURIAE

The State of Connecticut submits this brief as amicus curiae in support of the State of New York's petition for certiorari to review the decision of the United States Court of Appeals for the Second Circuit, *State of New York v. United States*, Nos. 91-6031, 91-6033, 91-6035, decided on August 6, 1991. The amicus supports the petition for certiorari because the issue presented in *State of New York v. United States* is of critical import to Connecticut and merits plenary review by the Court. An amicus brief filed by the State of Connecticut through its Attorney General does not require the consent of the parties. United States Supreme Court Rule 37.5.

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (Pub. L. 96-573) (hereinafter the "Policy Act"). This Act required states to provide for the disposal of certain classes of low-level radioactive waste generated within their borders, regardless of whether the waste was generated by private, federal or state entities.

In order to "induce" the states into providing disposal capacity, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Pub. L. 99-240, Title I) (hereinafter the "1985 Amendments"). This extraordinary statute, upheld in this case by the Court of Appeals for the Second Circuit, required states to take title and possession of low-level radioactive waste generated within the state or assume liability for damages any generator incurs if the states failed to provide disposal capacity for such waste by January 1, 1996. This statute simultaneously barred Connecticut from precluding, limiting or regulating the generation of low-level radioactive waste within its borders, while compelling the State to provide for disposal of such waste.

The 1985 Amendments thus imposed a tremendous economic and political burden on the State of Connecticut, forcing it to mobilize all of its sovereign powers to implement the Act's requirements. The State Legislature has enacted a series

of laws (Public Acts 83-2, 87-540, 88-230, 88-243, 88-361, 89-330, 90-98, 91-326, 91-337, Special Session 91-1) to implement the 1985 Amendments, including the creation and funding of a new state agency to oversee the siting and construction of a disposal facility. The agencies of the Executive branch of the State have promulgated extensive regulations (Regulations of Connecticut State Agencies (proposed) Sections 22a-163f-100 through 22a-163f-107 and 22a-163o-1) to enable them to oversee and administer the project. (See also Regulations of Connecticut State Agencies 22a-163f-1 through f-10, 22a-163l-1 and 22a-163t.) The Connecticut Hazardous Waste Management Service, the State authority charged with siting a low-level radioactive waste disposal facility, has already begun the monumental project of complying with Congress' fiat that the State must dispose of low-level waste.[1]

The Attorney General for the State of Connecticut supervises the provision of legal counsel to the above entities on the myriad laws and regulations that are involved in implementing this Act. The judicial system of the State of Connecticut will be required to condemn residential and agricultural land for the facility and will further be strained as the State may be obliged to sue its own citizens – adjacent landowners and citizens' groups – for acts of civil disobedience in order to implement the 1985 Amendments. Challenges to the State's implementation of the federal statute will be heard in State court at State expense.

The tasks placed upon the instrumentalities of the State of Connecticut by the 1985 Amendments have significantly imposed on the State's limited government resources. As of June 30, 1991, the State had expended $5,500,000 (five million, five hundred thousand dollars) on the first stages of

[1] The plans already drawn up by the Hazardous Waste Management Service include Site Selection Plan, Comment Response Document to the Draft Site Selection Plan, Public Participation Plan, Draft Site Screening Report, Quality Assurance Plan, Environmental Impact Study Plan, Generic Site Characterization Plan and Low-Level Radioactive Waste Management Updates.

administering the low-level radioactive waste responsibilities mandated by the 1985 Amendments.

The siting of a low-level waste disposal facility in Connecticut has already imposed – and will further impose – an enormous burden on the State and its citizens. Connecticut is the second most densely populated State in the nation. Three Connecticut towns were identified in June of 1991 by the Hazardous Waste Management Service as potential sites for Connecticut's low-level radioactive waste disposal facility. Forty-three thousand, three hundred and sixty-eight people live in those towns (*Connecticut State Register and Manual*, 1991, Connecticut Secretary of State). Many homeowners in those areas cannot sell their homes. Buyers are unwilling to locate in proximity of potential low-level radioactive waste disposal sites or are unable to obtain financing from reluctant lending institutions. Demographic considerations resulted in the selection of sites containing some of the only remaining prime farm land in those areas. Affected citizens have no ability to appeal to their state government, as Congress has preempted all state regulatory power while compelling the state itself to provide for disposal of low-level radioactive waste.

The State of Connecticut is only one of at least fourteen states that may be forced to construct a facility. Despite the tremendous amount of State resources and revenues expended to comply with the 1985 Amendments, the State's ability to construct and operate a safe disposal site in Connecticut on a timely basis is still uncertain. If a disposal site is not in operation in Connecticut by January 1, 1996, the 1985 Amendments will force the State to "take title" and possession to all the Class A, B and C low-level radioactive waste generated in Connecticut by privately owned utility companies and other entities.

SUMMARY OF ARGUMENT

Plenary review is needed in this case because the Second Circuit's decision represents a dramatic and unwarranted extension of the principles articulated by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Relying on *Garcia*, the Court of Appeals for the Second Circuit upheld the Low-Level Radioactive Waste Policy Amendments Act of 1985. Although the states are entirely preempted from regulating the generation of low-level radioactive waste, the 1985 Amendments compel the states themselves to provide for the disposal of all such waste or to take title and possession of the waste and be liable for any damages resulting from that waste. This statute reflects a unique and terribly burdensome encroachment on state sovereignty not envisioned by this Court in *Garcia* or by the framers of the Tenth Amendment.

This case represents a significant extension of *Garcia* and subsequent Tenth Amendment cases for several reasons.

- Rather than imposing federal regulation on state activities in an area which may or may not be a "traditional" governmental function, *Garcia*, *supra*, 469 U.S. at 547, Congress here has compelled the state itself, against its will, to enter the field of disposal of low-level radioactive waste, with draconian consequences if it fails to do so.

- Congress here did not merely extend to state or local governmental entities the same federal requirements that are imposed on private entities, nor did it merely compel states to impose federal standards or requirements on private businesses. Rather, in the 1985 amendments, Congress imposed a unique and onerous burden, not on the private or public entities that generate nuclear energy, but on the states themselves.

- A critical element of the statutes upheld in *Garcia* and other cases against Tenth Amendment challenges is notably absent from the 1985 Amendments. In the past, Congress has made clear that states retain the ultimate choice to refrain from regulatory responsibilities in an area involving federal regulation or from participation in federal programs if they do not want to accept the burdens that Congress imposed on them. While the choice of not participating in an important federal program may have been an undesirable one for the states, the choice was possible nonetheless. Under the 1985 Amendments, no state can choose to remove itself from the field of low-level radioactive waste. It can neither regulate nor prohibit production of such waste within its borders. It is simply required, by Congressional fiat, to provide for disposal of all Class A, B and C low-level waste produced by private or federal generators or take title to that waste.

The Court has recognized that there may be some "affirmative limits that the constitutional structure might impose on federal action affecting the States," *Garcia*, *supra*, 469 U.S. at 556, but it has never identified or defined those limits. This case presents the Court with a compelling need to do so.

In *Garcia*, the Court concluded that state participation in the federal political process would "ensure that laws that unduly burden the states will not be promulgated." 469 U.S. at 556. However, this is a case in which the federal political process plainly failed to protect state sovereignty. Far from being a "paragon[] of legislative success, promoting state and federal comity," *State of New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991), here Congress itself opted out of an extremely difficult political and economic problem and imposed it on the states. Having promoted nuclear power through federal policies and having displaced the states from regulating in this field, Congress squarely placed the burden of disposing of this waste on the states themselves, notwithstanding the enormous political and economic consequences for the states and their localities. If the federal political process is sufficient to satisfy the Tenth Amendment in this case, then the Constitution places no limits on the draconian actions

which Congress – for its own political purposes – may wish to take against the states.

This Court should grant certiorari to review the decision of the Second Circuit and clearly define the limits to its decision in *Garcia*.

ARGUMENT

I. THE 1985 AMENDMENTS EXCEED THE AFFIRMATIVE LIMITS WHICH THE CONSTITUTION IMPOSES ON CONGRESSIONAL ACTION AFFECTING THE STATES.

For many years Congress encouraged the development of nuclear power as a means of securing a safe, dependable, domestic source of electrical generation. *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978). Following Congress' lead, the utility companies in some states, like Connecticut, began an ambitious nuclear construction program in the 1970's and early 1980's. Today, Connecticut is host to four nuclear powered electrical generating stations, co-owned by a consortium of utility companies located in different states and providing electricity on an interstate transmission grid to all of New England.

A by-product of the nuclear generation of electrical energy is nuclear waste – high-level radioactive waste and low-level radioactive waste. The federal government has accepted responsibility for the disposal of high-level radioactive waste and low-level radioactive waste above Class C. Congress, however, through the Low-level Radioactive Waste Policy Amendments Act of 1985 (the "1985 Amendments") has imposed on the states the responsibility for disposing of all Class A, B and C low-level radioactive waste generated within its borders. 42 U.S.C. § 2021b *et seq.* The low-level radioactive waste generated by the nuclear power plants located in Connecticut accounts for 97 percent of the low-level radioactive hazard in this state.[2] Under the 1985 Amendments, Connecticut is now responsible for the disposal of all Class A, B and C low-level radioactive waste created by the generation of electricity in Connecticut by privately owned utility companies which distribute electricity on an interstate basis. Connecticut is also responsible for the disposal of the low-level radioactive waste created by all other private radioactive waste generators located in the state.[3]

Congress compelled compliance with the 1985 Amendments by imposing severe penalties for a state's failure to provide disposal capacity. "If a state . . . is unable to provide for the disposal of all such waste . . . each state . . . shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence of the failure of the state to take possession of the waste . . ." (42 U.S.C. § 2021e(d)(2)(C)). This coercive mandate, known as the "take title" provision, coupled with potentially enormous monetary liabilities, is unprecedented in United States history and contravenes the basic principles of federalism embodied in the Tenth and Eleventh Amendments.

In *State of New York v. United States of America*, 942 F.2d 114 (2nd Cir., 1991), the Court of Appeals determined that the 1985 Amendments did not violate the states' sovereign interests reserved to them under the Tenth Amendment. Instead, relying on *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for the proposition that state sov-

[2] *Low-Level Radioactive Waste Management in Connecticut – 1989 and Projections*, Section 2.2, Table 2-4 1990, Connecticut Hazardous Waste Management Service.

[3] The State of Connecticut generates a minimal amount of low-level radioactive waste at state-owned-hospitals and universities. The State of Connecticut generated only seven-tenths of one percent of the total volume of low level radioactive waste generated in the state and only one-thousandth of one percent of the radioactive hazard. *Low-Level Radioactive Waste Management in Connecticut – 1989 and Projections*, pp. 2-16 through 17, Table 2-5, (1990) (Connecticut Hazardous Waste Management Service).

ereignty is protected by the federal political process itself, the Court held that since "Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recommendations," the 1985 Amendments did not violate the constitution. *State of New York v. United States, supra*, 942 F.2d at 120.

In *Garcia*, however, this Court specifically noted, without identifying or defining them, the possibility of "affirmative limits" which "the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia, supra* 469 U.S. at 556. Again in *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), this Court "left open the possibility" that there exist "constitutional limitations" on Congress' power over the states independent of the national political process. Nonetheless, the Court of Appeals in this case simply extended *Garcia* to uphold the unique intrusion on state sovereignty reflected in the 1985 Amendments, without considering whether the Amendments exceeded the "affirmative limits" of the constitution.

This Court has previously identified two situations in which Congressional action may directly affect states' sovereignty:

1) Congress' regulation of "state activities" and

2) Congressional attempts to "control or influence the manner in which States regulate private parties." *South Carolina v. Baker*, 485 U.S. at 514. The 1985 Amendments, however, reflect Congressional action in a totally new and different direction – compelling state action in a field the states have not previously entered and in which private entities are not subject to the same Congressional compulsion.

Unlike the Fair Labor Standards Act discussed in *Garcia*, or the Tax Equity and Fiscal Responsibility Act of 1982 examined in *South Carolina v. Baker*, the 1985 Amendments do not simply extend federal regulation of commerce to state

entities or activities. Instead, the 1985 Amendments explicitly compel each state to commence disposing of low-level radioactive waste by January 1, 1996. Nor is this an instance where Congress has sought to "influence" state regulation of private entities, as did the statutes construed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982). Although Congress' power under the Commerce Clause is not confined to the private sector (*E.E.O.C. v. Wyoming*, 460 U.S. 226, 250-51 (1983) (Stevens, J. concurring)), the 1985 Amendments impose the disposal obligation only on states and not on private waste generators. The 1985 Amendments, therefore, go far beyond the use of "state . . . machinery" in the regulation of private entities "to advance federal goals," approved by this court in *FERC v. Mississippi, supra*, 456 U.S. at 759, and do far more than "seek to control or influence the manner in which states regulate private parties." *South Carolina v. Baker, supra*, 485 U.S. at 514.

Congress, through the transfer of the ownership and possession of radioactive waste generated by private enterprise to the States, has not simply displaced "elements of state sovereignty." *Garcia, supra*, 469 U.S. at 550. Nor do the 1985 Amendments merely commandeer "the legislative process of the states by directly compelling them to enact and enforce a regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra*, 452 U.S. at 288. Instead, Congress has actually commandeered the states themselves, subjugating the state, its machinery of government and its treasury to private waste generators. Such an action finds no support in the Constitution and is "referable to no power granted to Congress over the subject . . . ." *Coyle v. Smith*, 221 U.S. 559, 574 (1911).

This Court has never sanctioned the "compelled exercise" of a state's "sovereign powers." *FERC v. Mississippi, supra*, 456 U.S. at 769. To the contrary, this Court has recognized choice as an essential element of state sovereignty.

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be.

Garcia, supra, 469 U.S. at 546.

State choice also embraces the converse of the above statement – the freedom to choose not to engage in an activity. This Court has repeatedly upheld federal statutes that affected state interests, in part because they maintained the states' freedom to refrain from the activity in which Congress authorized state participation.[4] The states, however, cannot withdraw from the federal low-level radioactive waste program. Under the 1985 Amendments, the states have only Hobson's choices: dispose of the waste, take title to it and possess it or pay any damages resulting from the waste. The 1985 Amendments compel this state action even though a state may neither preclude nor regulate nuclear power plant generation of low-level radioactive waste (42 U.S.C. § 2021(c)).

The inability of a state to prohibit or limit generation of low-level radioactive waste – the source of the underlying problem – accentuates the inequity of thrusting title, possession, liability and responsibility for disposal upon the states. This inequity is compounded by the fact that Congress also required the states to be responsible for disposal of and liable for, certain low-level radioactive waste generated by the agencies of the Federal Government (42 U.S.C. § 2021c(a)(1)(B)).

Hence, the 1985 Amendments direct and compel state action in a manner never before considered by this Court. The Court of Appeals' reliance on *Garcia* to uphold this statute dramatically restricts the Tenth Amendment's protection of state sovereignty in a manner never intended by this Court in *Garcia*.[5]

II. THE NATIONAL POLITICAL PROCESS FAILED TO PROTECT THE STATES FROM UNDULY BURDENSOME FEDERAL REGULATION AS POSTULATED BY THIS COURT IN *GARCIA*.

In its review of the 1985 Amendments, the Court of Appeals determined that it was sufficient that the federal political process carried the 1985 Amendments through Congressional debate and vote to their final enactment into public law: "The political process ensures that laws that unduly burden the states will not be promulgated. *Garcia,* 469 U.S. at 556." *State of New York v. United States, supra,* 942 F.2d at 120. The Court of Appeals, however, failed to "tailor" its Tenth Amendment analysis "to compensate for possible failings in the national political process . . ." *Garcia, supra,* 469 U.S. at 554, 556.

[4] See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act allows States to refrain from regulatory responsibilities in favor of federal regulatory agency); *Federal Energy Regulatory Com'n. v. Mississippi*, 456 U.S. 742 (1982) (states may decline to accept conditions imposed by Public Utilities Regulatory Policies Act by abandoning regulation of the field); *United Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) (states can avoid application of the Railway Labor Act by declining ownership of an interstate railway); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 581 (1985) (state can avoid application of the Fair Labor Standards Act by not requiring state employees to work overtime); *South Carolina v. Baker*, 485 U.S. 505 (1988) (states may avoid issuing registered bonds under Tax Equity Fiscal Responsibility Act by foregoing favorable tax treatment afforded registered bonds).

[5] The District Court plainly recognized that this case represented a significant extension of the principles articulated in *Garcia*, noting as it upheld the 1985 Amendments, that "it may well be this case which results in *Garcia* being overturned." *State of New York v. United States*, 757 F.Supp. 10, 13 (N.D.N.Y. 1990).

Contrary to the Court's analysis, the 1985 Amendments either contravene or constitute an exception to the general rule of *Garcia* that the federal political process will protect the states from "unduly burden[some]" legislation. Because Congress did not wish to take responsibility for the myriad problems associated with the disposal of low-level radioactive waste, the federal political process specifically and intentionally "unduly" burdened the states with the task. In the 1985 Amendments, Congress did not recognize "the special and specific position in our constitutional system" occupied by the states, nor did "the internal safeguards of the political process" protect the states' sovereignty in the manner envisioned by the Constitution. *Garcia, supra,* 469 U.S. at 556. Instead, in this instance, the federal political process was specifically employed to shift directly to the States a federal responsibility in a difficult political area. One of the "horrible possibilities that never happen in the real world," actually happened here. *New York v. United States,* 326 U.S. 572, 583 (1946) (quoted in *Garcia,* 469 U.S. at 556).

There was a failure of the process-based protections relied on in *Garcia.* The "[m]embers of Congress . . . elected from the various States" voted, not as representatives of the states, but as "Members of the Federal Government." *Garcia,* 469 U.S. at 564-565 (Powell, J. dissenting).

> One can hardly imagine this court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights. . . ."

Garcia, 469 U.S. at 565 n. 8 (Powell, J., dissenting).

Responsibility for disposal of low-level radioactive waste entails both political and legal liability and also horrendous economic burdens. The search for an appropriate site for

a waste disposal facility, the testing of potential sites, the displacement of homeowners, farmers, and parkland, and the construction of a proper and safe facility is an enormously complicated, expensive, technologically difficult and politically explosive process. Congressional delegation of that responsibility to the states requires the states' government to exercise judicial, executive and legislative powers to fulfill federal policies, blurring the line of proper political responsibility and shielding Congressional policy makers from accountability for unpopular decisions. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 Colum. L.Rev. 1 (1988).

The federal political process, through the coercive nature of the 1985 Amendments, upset the federal-state relationship established by the Constitution.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the states and the federal government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L.Ed.2d 171 (1985) quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

As this Court recently reiterated in *Gregory v. Ashcroft, supra,* 111 S. Ct. at 2399, one of the fundamental principles of government is the Constitutional establishment of ". . . a system of dual sovereignty between the states and the federal government." The dual system of sovereigns embodied in the Constitution reflected the framers' distrust of an omnipotent, federal government.

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

The 1985 Amendments are inconsistent with the constitutional balance of powers between the states and the federal government. The coercive imposition on the states of congressional policies that entail political and economic liabilities threatens the fundamental concept of separate sovereign entities coexisting under a constitutional framework. The 1985 Amendments are destructive of state sovereignty and are the result of a failure of the national political process to protect the "States as States." *Garcia's* strict standard for review of claimed Tenth Amendment violations must be "tailored" in this case "to compensate" for Congress' failure to respect state sovereignty. This Court's review of the Second Circuit's application of *Garcia* is therefore warranted.

CONCLUSION

For the reasons contained herein, Connecticut urges this Court to grant certiorari to review the decision of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT

AARON S. BAYER
Deputy Attorney General

WILLIAM B. GUNDLING*
Associate Attorney General

CHARLES WALSH
Assistant Attorney General

55 Elm Street
Hartford, CT 06106
(203) 566-8282

*Counsel of Record